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In the Supreme Court of the United States

OCTOBER TERM, 1969

FRANK SARELLI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JULIUS LUCIUS ECHELES
30 North La Salle Street
Chicago, Illinois 60602
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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To: *The Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Frank Sarelli, respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, which affirmed a judgment of the Criminal Division of the Circuit Court of Cook County, Illinois, convicting him of possession of marijuana in violation of State statutes.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported in 105 Ill. App. 2d 167, 245 N.E. 2d 49, and is reprinted herein as Appendix A.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on January 21, 1969, and petition for re-hearing was denied by that court on March 5, 1969. A timely petition for leave to appeal was filed with the Supreme Court of Illinois and was by that court denied on May 26, 1969.

This petition is filed within 90 days of said denial.

Jurisdiction of this court is invoked under Title 28, U.S. Code, Section 125 (3), and Rule 22(1) of the rules of this court.

QUESTION PRESENTED

Is not a State conviction which is predicated on a total absence of evidence a violation of due process of law in accordance with the Fourteenth Amendment to the Constitution?

STATEMENT OF FACTS

Petitioner was charged in a one-count indictment with selling marijuana to a Miss Jeanne Clark for $24, and sentenced to ten years to ten years and a day. (The minimum sentence under the Illinois statute). People's Exhibit 4, pieces of tin foil, was introduced into evidence. Miss Clark, testified that the pieces of tin foil were like the tin foil she saw on March 4, 1966. (Tr. 91)[1] When

[1] "Tr." is the original Transcript of Proceedings as filed in this court.

the police officers saw People's Exhibit 4 on the night in question and put the crushed green plant in it, "There was only one piece of tin foil. There was not two." (Tr. 148-9). Another police officer, however, stated there were two pieces of tin foil in the exhibit. (Tr. 248-9). The chemist signed the exhibit.

A stipulation was introduced by the State's Attorney and counsel for defense that if a chemist were to testify she would state that Officer Divillo submitted a brown envelope to the crime laboratory on March 5, 1966, and that on March 7, 1966, she removed a tin foil packet from the envelope which contained a crushed green plant, tested the plant and determined it contained marijuana and that she then returned the tin foil packet with the crushed plant back into the envelope and that it was subsequently delivered to the Evidence Recovery Section. (Tr. 295-6).

REASON FOR GRANTING THE WRIT

The alleged marijuana which was introduced into evidence was never identified as the same as that which the State's witness allegedly received from the petitioner. The Fourteenth Amendment prevents conviction and deprivation of liberty by State courts without evidence. *Heikkinen* v. *United States,* 355 U.S. 273, 78 S.Ct. 299, 2 L.ed 2d 264; *Garner* v. *Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L.ed 2d 207; *Thompson* v. *City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.ed. 2d 654, 80 A.L.R.2d 1355.

Although this point was not raised when first appealed to the Illinois Appellate Court, on Petition for Rehearing, it was raised, as was the point raised in the Supreme Court of Illinois on Petition for Leave to Appeal. "The court may as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of a fair and impartial trial, although no exceptions were taken or the question is imperfectly presented." *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395.

Accordingly, in this case, where there was no reference in the stipulation to State Exhibit 4 or to the tin foil and its contents which Miss Jeanne Clark said she received from the petitioner for $24, there is a total absence of evidence upon which to sustain the conviction. Although this court does not ordinarily entertain argument about the degree of insufficiency of evidence, if there is no evidence, this court will reverse. *Heikkinen* v. *United States, Supra; Garner* v. *Louisiana, Supra; Thompson* v. *City of Louisville, Supra.*

Although petition for leave to appeal was denied by the Supreme Court of Illinois in other marijuana cases, the

Supreme Court of Illinois has reversed for errors as in the case at bar. *People* v. *Judkins,* 28 Ill.2d 417, 192 N.E.2d 848, and *People* v. *Maurice,* 31 Ill.2d 456, 202 N.E.2d 480. In *People* v. *Brown,* 66 Ill.App.2d 317, 214 N.E. 2d 289, the Fourth Division of the Appellate Court of Illinois held that the stipulated testimony about the crime laboratory examination did not precisely identify the circumstances with the evidence introduced at trial. The Court stated (214 N.E.2d 290):

> "The evidence simply does not connect defendant with the crime alleged and fails to sustain the conviction which must, therefore, be reversed without remand."

(To be noted is that the decision in the instant case was filed by the Second Division of the Appellate Court of Illinois, there being four divisions of the First District of the Appellate Court of Illinois. Thus, conflicts within the Appellate Court were not resolved by the Supreme Court of Illinois, and accordingly, the instant petitioner was deprived of equal treatment of the law in accordance with the due process clause of the Fourteenth Amendment to the Constitution of the United States).

As there is no evidence whatsoever in the record to support this conviction, it is ". . . a violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *Louisville,* 362 U.S. 199, 206.

CONCLUSION

For the above stated reason, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX

APPENDIX A

OPINION OF THE APPELLATE COURT.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the unlawful sale of narcotics and was sentenced to a term of ten years to ten years and one day in the State penitentiary. He appeals, contending that he was not proved guilty beyond all reasonable doubt.

Miss Jeanne Clark, a student at the Chicago Art Institute, testified that on March 1, 1966 she resided at a hotel in the 800 block of South Wabash Avenue in Chicago. Approximately 9:00 P.M. on that date she entered a sundry store located at 732 South Wabash Avenue, which she had patronized on several occasions in the past, to purchase cigarettes. Defendant Sarelli, the owner and operator of the store, was behind the service counter. Upon observing a display of a certain brand of candies on the counter, Miss Clark stated she remarked that the sponsor of the candies was "making everything now." Defendant laughed and began conversing with Miss Clark concerning the sponsor of the candies, to which Miss Clark ultimately replied, "If [he] did everything he supposedly has done, he would have had to have been on dope."

The substance of Miss Clark's testimony as to the conversation with defendant which ensued following these initial remarks is as follows:

Defendant asked Miss Clark if she knew much about narcotics, to which she replied, "Not very much, except that it's not a very good thing to fool around with."

Defendant spoke of the various types of narcotics and stated, "Would you believe that I'm high right now? . . . I'm on cocaine," Miss Clark then stated she had been to a party where persons in attendance were "popping pills," to which defendant replied, "Why don't you get me invited to some of these parties." Miss Clark told defendant that she understood that some of the persons in attendance at the party were "in business" and that they might not appreciate the presence of defendant, to which defendant replied, "Well, I'm in business, too." Defendant then asked Miss Clark whether she had ever taken narcotics, to which she replied, "No." Defendant suggested that she return to the store when she had more time and stated, "We'll try something out. . . . You'll have some fun." Miss Clark then said goodnight and left the store.

Miss Clark contacted the police who met with her at her hotel the following evening. Officers Harnett and Davillo contacted Miss Clark on the afternoon of March 4, 1966, after school classes, and transported her to police headquarters at 11th and State Streets where she was searched by a police matron and given $10 in pre-recorded funds. Approximately 3:30 P.M. she was transported to defendant's store by Officers Harnett and Davillo to attempt a purchase of narcotics from defendant. After she entered the store Miss Clark was told by defendant that she could not "get anything" for $10 and suggested that if she would return later that evening with $25 she might be successful in making a purchase of narcotics. Miss Clark agreed and left the store.

The pre-recorded funds were returned to the officers and they drove her back to school. At 7:00 or 7:30 P.M. that evening Miss Clark was again transported to 11th and State Streets by the officers where she was again searched

and given $25 in pre-recorded funds, in the form of two ten-dollar bills, four singles, one-half dollar and two quarters. The officers and Miss Clark thereupon returned to the vicinity of defendant's store and Miss Clark again entered the store. She was informed by defendant that he had no narcotics at the time but that he was expecting a delivery in an hour. Miss Clark returned to the police vehicle and rode with the officers for a while, after which they returned to defendant's store between 9:00 and 9:30 P.M.

Defendant's store proper is 40 to 50 feet deep, running east to west, and is 25 feet in width, fronting on Wabash Avenue. Inside the store are three merchandise display racks or gondolas, one along the north wall and one along the south wall of the store, and the third running directly down the center of the store; all three racks run in an east-west direction. There are two long, east-west aisles in the store, running between the three above mentioned merchandise racks, and two short aisles running north to south, intersecting the center merchandise rack. The latter, north-south aisles are situated approximately 12 feet and 15 feet from the front store entrance. The latter north-south aisle, situated approximately 15 feet from the front entrance, runs directly into the south wall merchandise rack at a point where the cash register is located; this aisle shall hereinafter be referred to as the "second north-south aisle."

Miss Clark again entered the store while Officer Hartnett remained in the police vehicle which had been parked around the corner from the store; Officer Davillo stationed himself across the street from the store and observed Miss

Clark as she entered the store and while she was inside. Miss Clark was told by defendant to wait, and a short while later two men entered and walked to the rear of the store where they engaged defendant in conversation. Defendant thereafter returned to Miss Clark and told her to take a seat behind the cash register. He then went back to the two men and returned with a tinfoil packet which he gave to Miss Clark in return for $24 of the pre-recorded funds which he placed in his pocket. Miss Clark testified she opened the packet and observed green leaves resembling tea leaves. Defendant stated the leaves were "reefers" and that Miss Clark would have to "roll her own." Miss Clark returned to the police vehicle and the officers field tested the contents of the tinfoil packet which they found to be marijuana. It was stipulated that the packet contained marijuana. The officers told Miss Clark to return to her hotel after delivering the remaining funds to them, and the officers proceeded toward defendant's store.

When the officers entered the store defendant was standing approximately four feet from the cash register near the second north-south aisle. The officers drew their service revolvers and told everyone present to raise their hands and to remain where they were. Defendant and the two men previously mentioned by Miss Clark were told to move into the north east-west aisle and to lie on the floor. They were searched by the officers but the pre-recorded funds were not found on their persons, nor were the funds found in the store's cash register.

A search of the premises was conducted and the funds were located partly on the floor and partly on the shelf of a nearby merchandise rack in the area of the north east-west aisle and the second north-south aisle, near the

place where defendant was standing when the officers entered the store. The presence of the money was called to the attention of the arresting officers by one of the officers who had been summoned to transport prisoners. The serial numbers of the funds found were compared to those of the funds given to Miss Clark earlier that evening.

Police Officer Ford was called as a witness by the defendant and testified that he was summoned to the defendant's store on the evening in question to transport prisoners. He stated he observed the pre-recorded money lying on the merchandise rack near the north east-west aisle and the second north-south aisle. He called the presence of the funds to the attention of the arresting officers, who at the time were in the process of searching the cash register, and one of them retrieved the money.

Defendant testified in his own behalf and stated that he had seen Miss Clark in his store on several occasions prior to the date in question and that she entered the store several times on that day. Defendant denied conversing with Miss Clark about narcotics, denied selling narcotics to her, and denied receiving $24 from her in return for narcotics.

Defendant contends that he was not proved guilty beyond all reasonable doubt. He argues that Miss Clark's testimony is unconvincing and further that it is directly and positively contradicted by defendant's testimony. As is evident from the foregoing summary of the evidence the sole question involved is the credibility of the witnesses. The credibility of witnesses and the weight to be given to their testimony is for determination by the trier of fact, and that determination will not be disturbed where, as here, there is ample evidence, if believed, to support the

judgment. People v. Jackson, 28 Ill. 2d 37. A conflict in the evidence does not, of itself, require a reversal of a finding of guilty. People v. Greer, 28 Ill. 2d 107.

Miss Clark gave a clear and detailed account of her conversations and transactions with the defendant which was unshaken on cross-examination. This is not a typical narcotics-informer case, and defendant has failed to impeach the credibility of Miss Clark. She having had no prior history of the use of narcotics, was approached by defendant to "try something out" and notified the police. She submitted to two searches at police headquarters and went to defendant's store several times on March 4, 1966 for the purpose of cooperating with the police in effecting a controlled purchase of narcotics from defendant, which she succeeded in doing.

Miss Clark's testimony was further corroborated by that of the arresting police officers, and by the presence of the pre-recorded funds in defendant's store when it was searched after Miss Clark secured the marijuana from defendant. The fact that the two arresting officers testified that defendant was observed standing in the south east-west aisle of the store near the cash register when they entered, whereas Officer Ford testified that he first observed the pre-recorded funds in the north east-west aisle near the second north-south aisle, does not mean that this evidence has no probative value whatever, as is suggested by defendant. Defendant's store was very narrow and contained three rows of merchandise racks; defendant was first observed by the officers standing approximately four feet from the cash register, near the second north-south aisle, and was told by the officers to move to the north east-west aisle; the money was located near the same north-south aisle where defendant was initially observed; the

witnesses were testifying to a very small area with respect to the relative positioning of the defendant, when first observed, and the money. This was a matter of weight and credibility for the trier of fact, and not a matter of the competency as was the situation in the case of People v. Nelson, 18 Ill. 2d 298, cited by defendant. In the Nelson case, which involved a conviction on the charge of possession of narcotics, the Court held the testimony of the two arresting officers valueless, inasmuch as one testified that he observed defendant transfer a package (containing narcotics) to another person inside a building, whereas the other officer testified he observed the package being transferred outside the building.

The remaining cases cited by defendant in support of his position are likewise not in point: People v. Coulson, 13 Ill. 2d 290; People v. Bentley, 357 Ill. 82.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and MCCORMICK, J., CONCUR.